...TION FILED
AUG 25 1995

No. 95-134

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MARY E. ISBELL, DENNIS ISBELL, JOHN ISBELL, MARSHA ISBELL, JOSEPH ISBELL, THE STATE OF ARIZONA, MARICOPA COUNTY, THE CITY OF CHANDLER, AND THE MARICOPA COUNTY SUPERIOR COURT,
Respondents.

On Petition For A Writ Of *Certiorari* To The Arizona Supreme Court

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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August 25, 1995

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2, the Association of American Railroads ("AAR") respectfully moves for permission to file the attached *amicus curiae* brief. Petitioner Southern Pacific Transportation Company and the Respondents State of Arizona, Maricopa County, and the City of Chandler have consented through their counsel to the filing of this brief; the Respondents Isbell have not. Correspondence concerning consent/non-consent has been lodged with the Clerk of this Court.

AAR is a voluntary, non-stock, nonprofit, incorporated trade association, whose members constitute the nation's major freight railroads. Amtrak, which carries virtually all intercity rail passenger traffic, is also a member of AAR. AAR member railroads operate trains on more than 150,000 miles of track, and most of the 170,000 rail-highway grade crossings in the United States. They have been active participants in the federal Grade Crossing Program since the enactment of the Federal Rail Safety Act of 1970 (FRSA)[1] and the adoption of the federal Grade Crossing Program.[2] AAR members thus have a vital interest in 23 U.S.C. § 409, since it is essential to the continued success of the federal Grade Crossing Program.

AAR seeks to file a brief *amicus curiae* only when a case poses an issue of great significance to the railroad industry nationwide. This is such a case, since it involves a construction of 23 U.S.C. § 409, a statute which impacts railroads at virtually every highway crossing over which they operate. Section 409 expressly prohibits discovery and admission into evidence in state and federal courts of all reports, surveys, schedules, lists or data compiled for the purpose, *inter alia*, of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadways, or railroad-highway crossings, pursuant to Sections 130, 144, and 152 of the Highway Safety Act, or for the purpose of developing any highway safety construction improvement project in any action for damages

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[1] 49 U.S.C. § 20101, *et seq.* (as amended, original version at 45 U.S.C. § 421, *et seq.*)

[2] The federal Grade Crossing Program emanates from the Highway Safety Act of 1973, Pub.L. No. 93-87, 87 Stat. 282, codified as amended 23 U.S.C. § 130.

arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The decision below, in order to avoid, in its words, *"... sacrific[ing Arizona's] tort scheme on the altar of the federal statutory scheme,"* fails to follow the federal circuit decisions and apply Section 409 according to its terms. Instead, it construes the statute so narrowly that it eviscerates the protection which the statute was designed to afford, and, from a practical standpoint, renders it a nullity.

23 U.S.C. § 409 was enacted to further the interest of highway safety by ensuring complete candor between state highway authorities and private parties such as railroads which share information with respect to hazards at rail-highway grade crossings. The resulting uninhibited and full disclosure of hazards, and the grade crossing improvement projects occasioned thereby, have made the Grade Crossing Program one of the most highly effective highway safety Programs ever enacted, according to the U.S. Department of Transportation. AAR members have played an active role in the success of the Program, and share with state agencies an interest in maintaining the free flow of state-railroad information, uninhibited by the threat of federally-mandated records being used against them in tort litigation.

Quite properly, the petition is limited to arguing the propriety of the holding below with respect to the documents in issue. Since AAR members operate in a number of states, and submit various types of information and documents in cooperating with a number of highway agencies, they have an interest in maintaining a uniform interpretation of Section 409. Similarly, they share with the states an interest in preventing a recurrence of the quandary which the statute was enacted to obviate: the conflict between fostering the

greater federal interest in preventing accidents on the highways, and facilitating tort litigation against them through the Grade Crossing Program or other Highway Act data they have generated.

Accordingly, AAR respectfully requests leave to present its views on the issues raised in this litigation.

Respectfully submitted,

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August 25, 1995

QUESTION PRESENTED

Whether materials compiled by a state highway department and a railroad in connection with a grade crossing improvement project fall within the proscription of 23 U.S.C. § 409, which prohibits discovery and admission into evidence in a Federal or State court proceeding all "reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadways, or railroad-highway crossings ... under Sections 130, 144 and 152 of [Title 23, United States Code (the Highway Safety Act)] or for the purpose of developing any highway safety construction development project which may be implemented using federal funds ...."

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is a voluntary, non-stock, nonprofit, incorporated trade association. Its members constitute the nation's major freight railroads, operating approximately 76 per cent of the total line-haul mileage, and producing some 94 per cent of freight revenues. Amtrak, which carries virtually all intercity rail passenger traffic, is also a member of AAR.

AAR represents its members before courts, agencies and Congress on matters of concern to the railroad industry.

Safety at rail-highway grade crossings is a vital concern of AAR and its members, who operate trains over 150,000 miles of track, and most of the 170,000 rail-highway grade crossings in the United States. Since the enactment of the Federal Rail Safety Act of 1970 and the adoption of the federal Grade Crossing Program,[1] AAR members have actively participated in that program, which has proven to be "one of the most successful highway safety measures ever enacted."[2] Essential to the continued success of the Program is 23 U.S.C. § 409, which is designed to insure candor and the integrity of materials compiled to enhance safety at rail-highway grade crossings. Under that statute, those items cannot be discovered or admitted in evidence in federal or state courts.

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[1] 49 U.S.C. § 20101, *et seq.* (as amended, original version at 45 U.S.C. § 421, *et seq.*) (FRSA). The federal Grade Crossing Program emanated from the Highway Safety Act of 1973, Pub.L. No. 93-87, 87 Stat. 282, codified as amended 23 U.S.C. § 130. The Secretary of Transportation's role under FRSA and the Highway Safety Act is implemented through the Federal Railroad Administration (FRA) and the Federal Highway Administration (FHWA).

[2] "The federal Grade Crossing Program has been one of the most successful highway safety programs ever enacted, reducing fatal and non-fatal accident rates by 88% and 62%, respectively, and saving more than 6,400 lives and preventing more than 26,500 ... injuries." Report of the Secretary of Transportation to the United States Congress, *The 1991 Annual Report on Highway Safety Improvement Programs* (April 1991), at IV-5. This dramatic reduction in accidents has continued. USDOT estimates that more than 7,200 fatalities and 31,000 nonfatal injuries have been prevented. Report of the Secretary of Transportation to the United States Congress, *The 1993 Annual Report on Highway Safety Improvement Programs* (April 1993), at IV-5.

SUMMARY OF ARGUMENT

There are special and important reasons why this case should be reviewed by this Court. Section 409 applies to state and federal courts. In order for this statute to achieve its purpose, it is essential that it be interpreted uniformly. The state court in this case has strayed from the principle of uniformity, and is out of step with the federal circuits.

As noted in the Petition, previous decisions of the federal courts of appeal and most state appellate courts have applied the statute literally, and correctly.[3] However, the decision below rejects the statute's plain language and holds it inapplicable on narrow grounds for which there is no legal basis. The decision below represents a state challenge to the superior federal interest embodied in the statute, that of ensuring integrity in the information-gathering and decision-making processes.

Thus, this case involves an important question of federal law which has not been, but should be settled by this Court under the criteria governing review on *certiorari* under U.S. Supreme Court Rule 10.1(c). At the very least, the decision below demonstrates a clear conflict with prior

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[3] One other state court has deviated from the plain language of the statute and reached incongruous results. Although Section 409 expressly covers "data" without limitation, and "data" is usually defined as "facts," *Wiedeman v. Dixie Electric Membership Corp.*, 606 So.2d 1069 (La. 1993), *Cert. denied* 114 S.Ct. 2134 (1994) holds that "data" is divisible into constituent sub-parts, and that "raw data" is not covered by the statute. As a consequence of the *Wiedeman* decision, there is now pending in this Court a Petition for a Writ of *Certiorari* from a Louisiana state court "raw data" ruling against its state highway agency in *The State Of Louisiana Through The Department Of Transportation And Development, et al. v. Poole, et al.*, No. 95-172 October Term, 1995.

decisions of United States courts of appeals and other state courts of last resort on a federal question,[4] so as amply to satisfy the criteria in Rule 10.1(b).

ARGUMENT

I. THE DECISION BELOW VIOLATES FEDERAL SUPREMACY

The Court below openly acknowledges the primary motivation behind its strained reading of Section 409 -- to avoid the doctrine of Federal Supremacy. First, the Arizona Supreme Court admits that "[i]f we look only to words, we agree ... that [23 U.S.C. § 409] immunizes from discovery and admissibility the documents prepared in connection with the relevant federal safety program." (Pet.App., at 5a). It then ignores the clear mandate of the statute and holds that the statute **does not apply** to ***some*** reports and data, *i.e.*, those which are within the knowledge of a party, derived from sources other than a protected document.

The Arizona Supreme Court did not veil its motivation: compensating injured parties under Arizona's tort scheme:

> * * * [a literal reading of Section 409] would prevent [plaintiffs] from proving claims that could otherwise have been proven had there been no safety enhancement project. * * *

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[4] The conflict between the decision below and decisions by federal circuits and state courts are adequately discussed in the Petition filed herein, and will not be repeated here.

> But state damage claims can only be proved with facts. * * * *[T]he breadth of exemption* argued by Southern Pacific and the state, and *acknowledged by the court of appeals, would sacrifice the state tort scheme on the altar of the federal statutory scheme.*

(Pet.App., at 5a-6a). (Emphasis added.) This unabashed effort to ignore a clear policy choice made by Congress in defiance of federal supremacy is not shared by other state courts, which have recognized that 23 U.S.C. § 409 must prevail over state law by virtue of the Supremacy Clause.[5] Indeed, Arizona's intermediate Court of Appeals followed the leading federal case authority, acknowledging that Federal Supremacy governed its construction of Section 409:

> The disposition of this dispute is determined by the federal statue. Although the plaintiffs have made a state law wrongful death claim, the federal statute overrides Arizona's discovery rules by virtue of the Supremacy Clause. U.S. Const. art. VI, cl. 2. We are bound to follow the federal statute.

(Pet.App., at 22a.)

AAR's members, which operate throughout the contiguous states, would be particularly prejudiced if Section 409 were to be subjected to varied interpretations. The Arizona Supreme Court's attempt to end-run the Supremacy

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[5] *See, e.g., Sawyer v. Illinois Central Gulf R. Co.*, 606 So.2d 1069, 73-74 (Miss. 1992); *Wiedeman v. Dixie Electric Membership Corp., supra*; and *Claspill v. Missouri Pacific R. Co.*, 793 S.W.2d 139, 140-41 (Mo. 1990), *Cert. denied*, 111 S.Ct. 517 (1990).

Clause by its strained construction of Section 409 is, without more, ample reason for the exercise of this Court's *certiorari* jurisdiction.

II. BY ESCHEWING THE PLAIN LANGUAGE OF SECTION 409, THE DECISION BELOW JEOPARDIZES HIGHWAY SAFETY

The result reached below jeopardizes the basic purpose of Section 409, which was enacted to ensure that complete and accurate data would be compiled for decision-making purposes directly affecting highway safety. This was brought to this Court's attention in connection with the Petition for a Writ of *Certiorari* in *State of Alabama Highway Department v. Boone*, 572 So.2d 389 (Ala. 1990), *Cert. denied*, 112 S.Ct. 370 (1971),[6] wherein the United States, at the request of this Court (111 S.Ct. 1679 (1991)), explained the critical importance of Section 409:

> If reports and data concerning potential highway safety hazards are subject to discovery in tort actions, State and private parties will likely be deterred from compiling complete and accurate information about such hazards. As a result, federal highway safety programs -- which depend on information about safety problems supplied by the States and private entities such as railroads -- will be jeopardized.

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[6] Following the denial of the Petition for a writ of *certiorari* in *Boone*, Congress amended Section 409 in late 1991, by including an express prohibition against *discovery* of the enumerated materials.

Brief Of The United States As Amicus Curiae, No. 90-1412 (October Term, 1991), at p. 6. The United States also traced the history and motivation behind Section 409:

> The forerunner of Section 409 was a 1986 DOT recommendation that Congress amend Title 23 to provide that documents or data compiled in connection with federal highway safety programs "shall not be required to be made available pursuant to section 552 of title 5, United States Code, nor shall they be admitted into evidence, or considered for other purposes, in any action for damages mentioned or addressed in such [documents] or data." DOT Draft Bill, *Surface Transportation Reauthorization Act of 1986*, §5 (Feb. 5, 1986). The DOT's 1986 proposal, in turn, was based on similar DOT proposals prompted by concern that "highway departments are reluctant to [identify and prioritize roadway hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability. Memorandum from Marshall Jacks, Jr., Associate Administrator for Traffic Safety, Traffic Engineering, and Motor Carriers to D.L. Ivers, Chief Counsel, Federal Highway Administration (May 4, 1983). * * *

Id., at pp. 9-10.[7] By its holding that "the statute does not

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[7] Two federal circuits have described Section 409 as having dual purposes: (1) to facilitate administrative candor; and (2) to prohibit use of federally-required records as a tool in private litigation. *Harrison v.*

(continued...)

purport to protect facts within the personal knowledge of a party" (App. 5a), the decision below eviscerates Section 409 by allowing railroad-generated facts to be obtained from the railroad, and state-generated facts to be obtained from the state -- *i.e.*, ***all facts*** are thereby obtainable and available for use in litigation, thereby rendering Section 409 a nullity.

At the outset of the Grade Crossing Program, railroads faced a quandary. Cooperating fully with requests made by states as to additional grade crossing information, and collaborating with the states on their contemplated improvement projects, gave rise to tort liability considerations. Of particular concern was the ability of tort litigants to secure this evidence through discovery, and use it at trial. The states were faced with the same problem. The quandary was solved for both by the enactment of 23 U.S.C. § 409.

If state courts are left to construe Section 409 so as to promote interests unrelated to the statute's purpose, railroads and state agencies will again be faced with their former quandary. Each will be forced to make difficult choices which the statute was designed to obviate. Since a state agency must appear only in courts in its state, whereas railroads are subject to different court systems in each of the jurisdictions in which they operate,[8] railroads will bear the brunt of incorrect interpretations of Section 409.

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[7](...continued)
Burlington Northern R. Co., 965 F.2d 155, 160 (7th Cir. 1992); and *Robertson v. Union Pacific R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992).

[8] One AAR member (the Burlington Northern Railroad Company) operates in twenty-three (23) states.

Thus, the decision below jeopardizes the concerns underlying the enactment of Section 409 -- namely to remove all restraints that might inhibit state transportation departments and railroads from gathering and exchanging complete and accurate data necessary for making decisions directly affecting the public safety.

CONCLUSION

On the basis of the foregoing, *amicus curiae* Association of American Railroads respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Arizona Supreme Court in this case should be granted.

Respectfully submitted,

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